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3 CHARLES A. REHBERG, :

4                      Petitioner                      :

5 v. : No. 10-788

6 JAMES P. PAULK, ET AL. :

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8 Washington, D.C.

9 Tuesday, November 1, 2011

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11                   The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 10:01 a.m.

14      APPEARANCES:

15     ANDREW J. PINCUS, ESQ., Washington, D.C.; on behalf of

16           Petitioner.

17 JOHN C. JONES, ESQ., Marietta, Georgia; on behalf of

18 Respondents.

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1 P R O C E E D I N G S

2 (10:01 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first this morning in Case 10-788,  
5 Rehberg v. Paulk.

6 Mr. Pincus.

7 ORAL ARGUMENT OF ANDREW J. PINCUS

8 ON BEHALF OF THE PETITIONER

9 MR. PINCUS: Thank you, Mr. Chief Justice,  
10 and may it please the Court:

11 This Court has twice held, in Malley and in  
12 Kalina, that a complaining witness who sets a criminal  
13 prosecution in motion by submitting a false affidavit is  
14 entitled to qualified immunity, but not absolute  
15 immunity, in an action under section 1983. The Court  
16 rested that conclusion on its determination that  
17 complaining witnesses were subject to damages liability  
18 at common law when -- in 1871 when section 1983 was  
19 enacted.

20 The question in this case is whether the  
21 rule of Malley and Kalina also applies to a complaining  
22 witness who sets a prosecution in motion by testifying  
23 before a grand jury. Again, the common law provides the  
24 answer. The law is clear that in 1871 damages liability  
25 could be based on false grand jury testimony.

1 JUSTICE ALITO: The problem I have with your  
2 argument is that I don't really know what a complaining  
3 witness is in the grand jury context. Let's take the  
4 Federal grand jury as an example. Do you think there  
5 are complaining witnesses before Federal grand juries?

6 MR. PINCUS: I think there -- there can be.  
7 It depends obviously on the -- the circumstances, Your  
8 Honor, but -- but there certainly can be.

9 JUSTICE ALITO: A complaining witness I  
10 would think is a person who files a complaint, who  
11 causes -- in the Federal system it would be someone who  
12 files a complaint and attests to it under Rule 5. That  
13 person is asking that charges be brought. That's what  
14 it means to be a complaining witness, filing a  
15 complaint.

16 Nobody -- no witness before a Federal grand  
17 jury asks that an indictment be returned. They provide  
18 testimony, and they may want an indictment to be  
19 returned, but it's the prosecutor who asks for the  
20 indictment to be returned. So I don't see how there is  
21 a complaining witness in that sense in the traditional  
22 grand jury context.

23 MR. PINCUS: Well, Your Honor, the common  
24 law confronted precisely the same situation, and after  
25 public prosecutors came into being and when grand juries

1     were empaneled by them, the common law concluded that,  
2     both in 1871 and in the present, that there can be a  
3     person who is the motivating force behind the  
4     prosecution.

5                 CHIEF JUSTICE ROBERTS:   A -- a person?   What  
6     -- what if you have three elements to a crime, and you  
7     have one witness for each one.   You see somebody sees  
8     the guy trying to get into a car.   Well, maybe he left  
9     it -- maybe he locked his keys in.   Another sees the guy  
10    walking around with a television.   It might be his.   A  
11    third sees the guy selling the television to somebody  
12    else.   There's nothing wrong with that.   Each one  
13    testifies before the grand jury.   Who is the complaining  
14    witness?

15                MR. PINCUS:   Well, Your Honor, at -- at  
16    common law the complaining witness was more than just  
17    someone who gave evidence that was necessary for the  
18    warrant or the indictment to issue.   It was someone who  
19    was pushing for the prosecution to be brought.   All of  
20    these problems, of course, occurred at common law and  
21    they also occur in connection with the circumstances  
22    that the Court addressed in Malley and Kalina.

23                JUSTICE ALITO:   Well, let me give you  
24    another example that I think happens with some  
25    frequency.   You have a Federal grand jury and you have

1 testimony by an FBI or a DEA case agent, a person who's  
2 been working on the case, and that witness provides a  
3 lot of information supporting the charges that the  
4 prosecutor wants returned. You also have a cooperating  
5 witness, someone who has entered into a plea bargain and  
6 in exchange for that is providing a lot of incriminating  
7 testimony. Now, is there a complaining witness in that  
8 situation?

9 MR. PINCUS: Well, again, Your Honor, there  
10 can be. It depends -- it --

11 JUSTICE ALITO: Which one is it?

12 MR. PINCUS: It could be both.

13 JUSTICE ALITO: Both?

14 MR. PINCUS: It could be one or -- it could  
15 be -- it could be one or the other. I think these --  
16 these circumstances again are not unknown to the common  
17 law in the States. They --

18 JUSTICE GINSBURG: Mr. Pincus, you said -- I  
19 think you used the words "the one who motivated the  
20 charge" or something to that effect. And I'm looking at  
21 the complaint that was filed in this case and it says,  
22 and this is on page 28 of the joint appendix. It says  
23 Mr. Hodges -- that's the prosecutor -- know or should  
24 have known there was no probable cause. "He," Mr.  
25 Hodges, "directed Mr. Paulk to appear before the grand

1 jury and attest to the truth of such charges."

2 So if anyone was the instigator, it was the  
3 prosecutor, not his aide. But the prosecutor gets  
4 absolute immunity.

5 MR. PINCUS: Well, Your Honor, I -- I don't  
6 think we know, because the complaint also alleges that  
7 Mr. Paulk knew that his testimony was false and -- and  
8 made it -- and gave his testimony anyway.

9 JUSTICE GINSBURG: But if he did it -- if he  
10 did at the prosecutor's bidding, then he is not the  
11 prime mover.

12 MR. PINCUS: Well, the -- the complaint also  
13 alleges that they were conspiring together to bring this  
14 complaint. And so again, I think the facts will be  
15 developed. The -- the first indictment in fact listed  
16 Mr. Paulk as the complainant. So in many situations the  
17 concerns that Justice Alito was pointing to won't be  
18 present because there will be a clear complainant, as  
19 there was in this case.

20 JUSTICE KAGAN: But do you --

21 JUSTICE KENNEDY: What if an important  
22 witness is reluctant to testify, but is issued a  
23 subpoena by the United States attorney to appear before  
24 the grand jury, and then with reluctance he comes  
25 forward, but under oath provides all of the key

1 testimony necessary to indict. Is he a complaining  
2 witness?

3 MR. PINCUS: I think some lower courts have  
4 said no, Your Honor. Some lower courts have said --

5 JUSTICE KENNEDY: Well, what's the test we  
6 are supposed to use to decide?

7 MR. PINCUS: Well, the -- the test that this  
8 Court has set forth is whether the complaining witness  
9 is someone who sets the prosecution in motion. That's  
10 -- that's the phrase that this Court has used and that's  
11 the phrase that's -- that is reflected in the common  
12 law, based on the common law. And the lower courts have  
13 not had a problem applying that case. There are seven  
14 circuits that now have adopted the rule that --

15 JUSTICE KENNEDY: In the hypothetical I  
16 gave, what's the answer?

17 MR. PINCUS: I would say in the hypothetical  
18 you gave, Your Honor, that that person is not a  
19 complaining witness, because he did nothing other than  
20 come forward when he was subpoenaed. If someone comes  
21 forward to the prosecutor, urges an indictment, urges a  
22 prosecution and then subsequently is subpoenaed, that  
23 might be a different case because you have --

24 CHIEF JUSTICE ROBERTS: Urges, urges a  
25 prosecution. One area that causes me concern here are



1 the domestic violence cases, where someone may well  
2 report an episode, but by the time it gets to whatever  
3 the indictment procedure is, a grand jury or otherwise,  
4 is unwilling to -- to testify and pursue it. And yet  
5 that person may be the one who started the prosecution  
6 in motion. Is that individual a complaining witness?

7 MR. PINCUS: That -- that person may be a  
8 complaining witness. You know, at common law the  
9 complaining witness also has to be --

10 CHIEF JUSTICE ROBERTS: No, he says -- he or  
11 she says at the time, I -- I don't want prosecution to  
12 go forward. I -- you know, I would prefer that it not  
13 go forward.

14 MR. PINCUS: Then -- then that fact would  
15 obviously mitigate against her being a complaining  
16 witness. But -- but these --

17 JUSTICE SCALIA: Mitigate? Come on.

18 MR. PINCUS: Yes. She would not be --

19 JUSTICE SCALIA: Does it make her not a  
20 complaining witness?

21 MR. PINCUS: Yes, she would not be a  
22 complaining witness, Your Honor.

23 JUSTICE SCALIA: Okay.

24 MR. PINCUS: But I -- just to step back --

25 JUSTICE ALITO: The holding -- the holding

1     that you are asking for isn't going to do very much good  
2     if the -- if the mere issuance of the grand jury  
3     subpoena renders the person not a complaining witness.

4                   MR. PINCUS:   I don't think --

5                   JUSTICE ALITO:   In that situation, then why  
6     not subpoena everybody?

7                   MR. PINCUS:   I don't think the mere issuance  
8     of the subpoena does negate things that might -- take  
9     the hypothetical where there is someone who goes to the  
10    prosecutor, says there should be a prosecution here,  
11    maybe does the things that the hospital is alleged to  
12    have done in this case, and then subsequently is  
13    subpoenaed.   I don't think the subpoena negates that  
14    prior activity.   I don't think you can say, oh, now that  
15    you are subpoenaed we wipe away everything that you have  
16    done to set the prosecution in motion.

17                   But I think in the hypothetical that you  
18    propounded, where there -- the sole fact is someone  
19    doesn't do anything, they are subpoenaed to come before  
20    the grand jury and they give their evidence, that  
21    wouldn't meet the test.   But --

22                   JUSTICE KAGAN:   In a case where the  
23    prosecutor is the prime mover, can there ever be a  
24    complaining witness?   Where the prosecutor is making the  
25    decisions, can there ever be a complaining witness?

1                   MR. PINCUS: I think there can be, Your  
2 Honor. And in fact what this Court has indicated in  
3 other cases is that the fact that the prosecutor  
4 ultimately decides to seek the charge does not negate  
5 what's happened before.

6                   In the Hartman case, which dealt with a  
7 retaliatory prosecution under -- a First Amendment  
8 retaliation prosecution, the Court said the postal  
9 inspectors, who in that case were alleged to have been  
10 the motivating force behind the retaliatory prosecution,  
11 could be held liable if there also was no probable  
12 cause.

13                  JUSTICE SCALIA: Is the prosecutor a  
14 complaining witness?

15                  MR. PINCUS: The prosecutor can't be a  
16 complaining witness because the complaining witness is  
17 the person who provides the impetus.

18                  JUSTICE SCALIA: Who instigates the  
19 prosecutor.

20                  MR. PINCUS: Yes.

21                  JUSTICE SCALIA: Okay. What about the  
22 person who instigates the instigator?

23                  MR. PINCUS: I'm not -- I'm not sure of  
24 the --

25                  JUSTICE SCALIA: Well, somebody who comes up

1 to somebody and says: You know, you ought to -- you  
2 ought to try to start a prosecution against this person.

3 MR. PINCUS: At common law --

4 JUSTICE SCALIA: They say: Yeah, that's a  
5 good idea. So that person goes and -- and gets a  
6 prosecution started.

7 MR. PINCUS: And at common law that person  
8 could be -- could be liable for malicious prosecution  
9 because --

10 JUSTICE SCALIA: The person who  
11 instigates the instigator?

12 MR. PINCUS: The person who in testimony --  
13 a complaining witness, as Your Honor pointed out in --  
14 in your opinion in Kalina, a complaining witness does  
15 not have to actually participate in the judicial  
16 proceedings. To be a complaining witness at common law,  
17 you could be a person who outside the judicial process  
18 pushed forward and was the mover behind the --

19 JUSTICE SCALIA: So the instigator of the  
20 instigator is -- is a complaining witness or can be?

21 MR. PINCUS: Can be.

22 JUSTICE SCALIA: And you know what the next  
23 question's going to be, right?

24 MR. PINCUS: But tort law -- I mean --

25 JUSTICE SCALIA: The instigator of the

1 instigator of the instigator. I mean, does this go back  
2 forever?

3 MR. PINCUS: I think that's right, Your  
4 Honor. But I don't think the Court is writing on a  
5 blank slate here. Tort law has addressed these issues.  
6 There has been a malicious prosecution tort for hundreds  
7 of years. There certainly was in 1871, and tort law has  
8 dealt and continues to deal with the questions of  
9 causation and proximate cause and all of the questions  
10 that arise in these kinds of cases. So it's not as if  
11 the Court here would be writing on a blank slate.

12 And I think the critical thing is, the  
13 question here is whether or not there was an absolute  
14 immunity rule in 1871 for persons in the situation of  
15 the Respondent. That is the critical question that the  
16 Court has framed.

17 JUSTICE GINSBURG: The -- the -- instigator,  
18 what you call the complaining witness, would have  
19 been -- immunity, identical testimony at the trial  
20 itself, right?

21 MR. PINCUS: Yes, trial -- because --  
22 because -- well, the trial testimony could not be the  
23 basis for finding the person a complaining witness  
24 because by that point the prosecution has gotten  
25 rolling. But the question is what conduct can be used

1 to prove that this is the person who was the instigator,  
2 the prime mover behind the prosecution.

3 JUSTICE GINSBURG: It's only -- it's only  
4 what you call the complaining witness that gets this  
5 special treatment? All the other witnesses before the  
6 grand jury would be absolutely immune?

7 MR. PINCUS: Yes, Your Honor. That's what  
8 the common law rule was and that's what Congress  
9 confronted when it enacted section 1983 in 1871.

10 JUSTICE KAGAN: Could I make sure I  
11 understand what you just said, Mr. Pincus. When you  
12 said it can't be the testimony alone, is that right,  
13 that there have to be other acts exclusive of the  
14 testimony that make somebody a complaining witness?

15 MR. PINCUS: No, Your Honor, it could be the  
16 testimony alone. I didn't mean to say that. I think  
17 what I meant to say, maybe in response to  
18 Justice Alito's question, was the fact that testimony is  
19 under subpoena doesn't negate other evidence that's  
20 there. But the testimony alone can be enough, and there  
21 certainly are cases, common law cases from the 1800's,  
22 in which courts rely on testimony.

23 JUSTICE KAGAN: Rely on testimony, but rely  
24 on testimony exclusively; do you have he a cases that do  
25 that?

1                   MR. PINCUS: Well, the cases are -- the case  
2 are a little bit obscure, Your Honor, about what the  
3 facts are that they are relying on. So I don't want to  
4 say that absolutely positively there is one -- -

5                   JUSTICE SCALIA: I don't understand.

6                   MR. PINCUS: But I think it's a matter of  
7 logic.

8                   JUSTICE SCALIA: I really don't understand  
9 this. You have one witness in the grand jury  
10 proceedings. That's the only witness. Can that witness  
11 fall within your rule and be the complaining witness?

12                  MR. PINCUS: Absolutely, Your Honor.

13                  JUSTICE SCALIA: Just on the basis of the  
14 testimony alone?

15                  MR. PINCUS: Yes. But there could be --  
16 there could be other evidence as well. I think --

17                  JUSTICE SCALIA: So it's pretty risky to  
18 testify in a grand jury proceeding, then, right?

19                  MR. PINCUS: Well, the same --

20                  JUSTICE SCALIA: Because even though you  
21 haven't -- you don't care whether it comes out that way  
22 or not. You are subpoenaed and even though you are  
23 subpoenaed, you are going to hold me as a complaining  
24 witness.

25                  MR. PINCUS: It's the same risk that the

1     affiants bore in Kalina and Malley and it's the same  
2     risk that the common law imposes on complaining  
3     witnesses.

4                   JUSTICE SCALIA:   Well, the affiants came  
5     forward.   That's a different situation, isn't it?   They  
6     indeed were self-starting.   But the person who is  
7     subpoenaed to testify at a grand jury is not  
8     self-starting.   And you're saying that that person's  
9     mere presence and the mere fact of that person's  
10    testifying is enough to hold him to be the complaining  
11    witness.

12                  MR. PINCUS:   Your Honor, maybe I confused  
13    the hypotheticals.   I think we have one situation where  
14    there's someone, all they've done is they've been  
15    subpoenaed and they've come forward and they've given  
16    their evidence.

17                  JUSTICE SCALIA:   Yes.

18                  MR. PINCUS:   I think it would be very hard  
19    for that person to be labeled a complaining witness.

20                  JUSTICE SCALIA:   Hard or impossible?

21                  MR. PINCUS:   Impossible.

22                  JUSTICE SCALIA:   Hard or impossible?

23                  MR. PINCUS:   I think it would be impossible,  
24    because I don't think there's any evidence that that  
25    person --



1 JUSTICE SCALIA: That's a different word,  
2 thank you. So the testimony alone cannot be the basis?

3 MR. PINCUS: Compelled testimony alone. A  
4 person who testifies voluntarily before the grand jury I  
5 think is a different situation.

6 JUSTICE ALITO: You said that the issuance  
7 of a subpoena in itself is not sufficient to make  
8 somebody not a complaining witness. So if you are  
9 issued a subpoena you still might be a complaining  
10 witness if you really didn't need to get a subpoena. If  
11 you could have been persuaded to go without a subpoena,  
12 then maybe you could be a complaining witness.

13 MR. PINCUS: No, Your Honor. I think I was  
14 responding to a third, a third situation. So we have  
15 one situation where all someone does is testify under  
16 subpoena. We have another situation where someone  
17 testifies, that person not a complaining witness,  
18 someone who testifies voluntarily; that voluntary  
19 testimony certainly could be used as evidence.

20 JUSTICE ALITO: If somebody --

21 MR. PINCUS: And then the third situation --  
22 excuse me Your Honor, I was just -- the third situation  
23 is where there is pre-testimony evidence and there is  
24 also the fact that that person testified under subpoena.  
25 I don't think the fact that that person testified under

1 subpoena negates the fact that there is other evidence  
2 that that person may have been the person who pushed the  
3 prosecution forward. So that's the distinction that I  
4 was trying to draw.

5 JUSTICE BREYER: What is the reason why, if  
6 we give absolute immunity to the witness at a trial, we  
7 give absolute immunity to the prosecutors and government  
8 officials at the trial, and a grand jury is sort of like  
9 a trial, at least it's testimony under oath. And in  
10 addition there's this special thing about grand juries  
11 being secret, which if you allow people who are annoyed  
12 and they would be quite rightly angry, they have been  
13 acquitted, they had to go through this process, they'd  
14 want to sue somebody. If we let them sue, you will  
15 wreck the secrecy of a lot of cases. So I see a reason  
16 for treating the grand jury even more strictly. What's  
17 the reason for treating it less strictly?

18 MR. PINCUS: Well, I think there are two  
19 reasons, Your Honor. The first reason is that what this  
20 Court has said is that immunity decisions are based on  
21 the common law as --

22 JUSTICE BREYER: Suppose I don't accept  
23 that. Suppose I say, yes, I accept that, there's a  
24 relationship, but exactly what happened in 1871 is not  
25 precisely always the convincing feature for me. So I

1 read what the situation is today, and it is I think as I  
2 described it. So given the situation today, my question  
3 remains.

4 MR. PINCUS: Well, one -- one brief  
5 disagreement with your question, Your Honor. I think  
6 the situation today at common law is what it was.

7 JUSTICE BREYER: You can't disagree with my  
8 question.

9 (Laughter.)

10 MR. PINCUS: But --

11 JUSTICE BREYER: I would like an answer to  
12 my question.

13 MR. PINCUS: The answer is several-fold.  
14 The Court has given absolute immunity to witnesses in  
15 Briscoe. The policy reason -- the principal reason was  
16 the common law rule. The policy reasons that the Court  
17 gave were: A, we don't want to deter people from coming  
18 forward; and, B, the testimony will be put through the  
19 adversary process and it's public, and those are  
20 protections against false testimony.

21 In the -- in the grand jury situation those  
22 protections are not present, neither transparency nor an  
23 adversary process. And what the court said in Malley  
24 about people coming forward I think applies in the grand  
25 jury context as well for complaining witnesses. The

1 Court in Malley said we want people who are setting the  
2 prosecution in motion, the special category of  
3 complaining witnesses, we want them to think twice.  
4 That's not a bad thing when they are the motivating  
5 force behind the prosecution.

6 CHIEF JUSTICE ROBERTS: Well, I thought the  
7 whole point of the grand jury was to protect citizens  
8 from unwarranted prosecutions. The grand jury initiates  
9 the prosecution. So why do we look back beyond that?  
10 That's where the prosecution is initiating. You are not  
11 subject to prosecution until the grand jury returns the  
12 indictment. So why do we talk about complaining  
13 witnesses initiating the prosecution?

14 MR. PINCUS: I -- I think -- well, we talk  
15 about them, I think, because of the reality that there  
16 are cases and the common law recognized that there were  
17 cases where the reason the prosecution got rolling was  
18 because either a private person or a government person  
19 was the person who was push ing it along.

20 CHIEF JUSTICE ROBERTS: Well, somebody's is  
21 not --

22 MR. PINCUS: It's true that the grand jury  
23 -- I'm sorry.

24 CHIEF JUSTICE ROBERTS: No, go ahead.

25 MR. PINCUS: -- the grand jury's decision is

1 a step in the chain, but the Court has not said that,  
2 for example, the judge's decision in Kalina and Malley  
3 to issue the warrant broke the causal link between the  
4 false testimony in the affidavits in those case. Even  
5 though the judge was making an independent decision, the  
6 Court recognized, as the common law recognized, that  
7 there could be a causal chain back to the false  
8 testimony which essentially tainted the decisionmaker,  
9 the judge's decision, just as it taints the grand jury's  
10 decision. And in fact, what lower courts have said is  
11 that it is only when there is an allegation of false  
12 testimony or other impropriety in the grand jury that  
13 looking back is possible, but of course that's the very  
14 situation in this case.

15 JUSTICE GINSBURG: The question is where do  
16 you locate the grand jury? We have on the one side you  
17 recited Malley. That was an arrest warrant, testimony  
18 in support of an arrest warrant. Then we have the  
19 trial, where everybody gets absolute immunity. And the  
20 grand jury is in between those two. So why should we  
21 bracket it with the arrest warrant rather than with the  
22 trial? The arrest warrant is certainly pre-prosecution.

23 MR. PINCUS: Well, the first reason, Your  
24 Honor, is because that's what the common law did. And  
25 what the Court -- the Court's inquiry here is to look at

1 the common law and decide what Congress when it enacted  
2 the statute in 1871 confronted. And when Congress  
3 enacted the statute in 1871, there were -- the rule was  
4 that complaining witnesses who testified before grand  
5 jury -- that grand jury testimony of people who were  
6 complaining witnesses was not immunized as a basis for  
7 malicious prosecution liability.

8 What the Respondent is seeking here is to  
9 say: My grand jury testimony is immunized as a basis of  
10 section 1983 liability, but at common law that simply  
11 wasn't the rule.

12 JUSTICE ALITO: At common law did any grand  
13 jury witnesses have absolute immunity from a claim for  
14 malicious prosecution?

15 MR. PINCUS: Well, common law -- at common  
16 law -- at common law it wasn't a question of immunity.  
17 There was no defamation liability for any witness.

18 JUSTICE ALITO: Well, could --

19 MR. PINCUS: The only liability was for  
20 malicious prosecution.

21 JUSTICE ALITO: And could there be malicious  
22 prosecution liability for a witness before a grand jury  
23 who was not a "complaining witness."

24 MR. PINCUS: No, and that's the source of  
25 the distinction that the Court drew in Malley and

1 Kalina.

2 JUSTICE ALITO: So you are not really asking  
3 us to adopt the common law rule, are you? You are  
4 asking for a variation of the common law rule that is  
5 limited to complaining witnesses. Or are you going  
6 further. Are you saying that no witness before a grand  
7 jury should have absolute immunity from a so-called 1983  
8 malicious prosecution claim?

9 MR. PINCUS: No, Your Honor, we're not. We  
10 are asking for exactly the rule that was at common law.  
11 What the Court has said in Kalina and Malley is -- the  
12 rule that the Court adopted there was based on precisely  
13 the same distinction that we rely on here.

14 JUSTICE ALITO: So if I understand your  
15 answer, that you're not -- that this whole business  
16 about complaining witness is irrelevant. Any -- no  
17 witness before a grand jury gets absolute immunity.

18 MR. PINCUS: No, Your Honor, it's  
19 complaining witnesses. The distinction that the common  
20 law drew -- all witnesses were immune from defamation.  
21 Only -- the only people who could be subject to  
22 liability based on their testimony were people who  
23 qualified as complaining witnesses. That is why the  
24 court in Malley and Kalina drew the line it did. It  
25 said, these people, you were acting as a complaining

1 witness. The function you are performing by submitting  
2 this affidavit is being a complaining witness. At  
3 common law, that function -- true, it wasn't technically  
4 immune, but it was subject to liability. Liability  
5 could be premised on those statements.

6 JUSTICE ALITO: A complaining witness could  
7 -- who would satisfy the elements of the malicious  
8 prosecution tort could be liable?

9 MR. PINCUS: Yes.

10 JUSTICE ALITO: All right. That's a little  
11 different, isn't it?

12 MR. PINCUS: Well, what the Court has said,  
13 it said in Malley and Kalina, and what we're relying on  
14 here, is that those -- those people also -- Congress  
15 would have recognized in 1871 that there could be  
16 liability for people who fell into this category -- and  
17 so --

18 JUSTICE SCALIA: Well, you're saying that  
19 the only people who would be subject to suit for the  
20 malicious prosecution tort were complaining witnesses?

21 MR. PINCUS: Yes.

22 JUSTICE SOTOMAYOR: Mr. Pincus, you in  
23 answer to one of Justice Kagan's questions, you noted  
24 that you really can't find a case where a court relied  
25 exclusively on the grand jury testimony. In most of the



1 cases that I've reviewed, there's a discussion that both  
2 non-grand jury and grand jury testimony was being relied  
3 upon; is that accurate?

4 MR. PINCUS: I think that's right, Your  
5 Honor. It's awfully hard to tell, but I wouldn't want  
6 to represent there's one.

7 JUSTICE SOTOMAYOR: Could you tell me  
8 what -- the United States as amica is supporting a  
9 vacatur and remand on the ground that there might be  
10 adequate independent evidence from the grand jury  
11 testimony in this case to sustain a cause of action. Do  
12 you agree with their recommendation? And if you don't  
13 agree, assume that we were to adopt the United States'  
14 position. What would be the independent evidence that  
15 you have that would support a malicious prosecution  
16 claim?

17 MR. PINCUS: Well, there -- there is  
18 independent evidence in this case, Your Honor of --  
19 before the Respondent testified before the grand jury  
20 there were -- there are allegations that he conspired  
21 with the district attorney and others to fabricate the  
22 -- the evidence that he gave. And that obviously --

23 JUSTICE SOTOMAYOR: Now, the court below  
24 took that into account and said: You are only relying  
25 on the grand jury testimony to prove the conspiracy and

1     that's not enough.

2                   MR. PINCUS:   Well, Your Honor, I think that  
3     what the Eleventh Circuit said was because this was all  
4     directed to the grand jury testimony, we're not going to  
5     separate, uphold -- hold that there could be liability  
6     based on that alone.

7                   I think that's wrong for two reasons.   First  
8     of all, our principal submission, of course, is there  
9     can be liability premised on the grand jury testimony  
10    and that there is no basis in the common law for a  
11    different rule.

12                   And our second position would be, even if  
13    you, the Court, thought that grand jury testimony for  
14    some reason was off limits but became permissible as a  
15    basis for finding liability if there were other  
16    evidence, then that's true in this case as well.

17                   I want to return to Justice Breyer's  
18    question for 1 minute, because there was the third  
19    policy reason that I wanted to provide, which is, as we  
20    explain in our brief, in the States many prosecutors can  
21    proceed by information or indictment, and that we think  
22    it would be a peculiar situation if liability could be  
23    premised when a proceeding is initiated by information,  
24    which Malley and Kalina make clear, but that if the  
25    proceeding is by grand jury it would be wholly off

1 limits. That doesn't make much sense and it is totally  
2 inconsistent with the common law rule.

3 I would like to reserve the balance of my  
4 time.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
6 Mr. Jones.

7 ORAL ARGUMENT OF JOHN C. JONES  
8 ON BEHALF OF THE RESPONDENTS

9 MR. JONES: Mr. Chief Justice and may it  
10 please the Court:

11 The way the Respondent sees it is the  
12 extension of Briscoe into the absolute immunity for all  
13 witnesses in the grand jury with no distinction with  
14 respect to whether they are the complaining witness or  
15 otherwise.

16 As this Court has said in Briscoe, that you  
17 look at the purpose of protecting the witnesses, both at  
18 the grand jury proceeding and at trial, and you want to  
19 preserve every man's evidence and you want to keep the  
20 court from harassing --

21 JUSTICE SCALIA: You would acknowledge that  
22 if someone instigates the grand jury proceeding but does  
23 not testify, that person could be sued if indeed the  
24 instigation was malicious?

25 MR. JONES: If it's outside of the grand

1 jury -- and I go for the but-for test like the --

2 JUSTICE SCALIA: No, no, no, just answer my  
3 question. I've given you a hypothetical. He -- no  
4 doubt he instigated the grand jury proceeding. He -- he  
5 got the U.S. attorney to bring the proceeding. But he  
6 didn't testify. Could that person be sued?

7 MR. JONES: Yes, that person could be sued  
8 under the but-for standard.

9 JUSTICE SCALIA: So all he has to do to get  
10 himself off the hook is, after instigating it, he should  
11 testify, right? His testimony bathes him clean, is that  
12 it?

13 MR. JONES: No, that isn't. Because --

14 JUSTICE SCALIA: So all you are arguing,  
15 then, is that there has to be some evidence other than  
16 the mere testimony; is that your point?

17 MR. JONES: That is my point.

18 JUSTICE SCALIA: Okay.

19 MR. JONES: That there has to be some  
20 evidence other than the mere testimony. And if there is  
21 evidence other than the mere testimony, indeed you can  
22 go forward with a 1983 claim.

23 JUSTICE GINSBURG: Then you agree with the  
24 position that the United States took, which is you  
25 can -- if there was evidence outside of the grand jury

1 proceeding that this person was the instigator, that  
2 that could be the basis for a malicious prosecution 1983  
3 claim? I thought the United States' position was:  
4 We're not going to use the testimony before the grand  
5 jury, but if this person did things outside the grand  
6 jury to instigate the prosecution that -- that could --

7 MR. JONES: The way I understand the  
8 Solicitor General's position was that if the only way  
9 that you could prove the allegation was to use the grand  
10 jury testimony, then indeed you could not bring a suit  
11 under 1983. But I think as Justice Scalia's question  
12 was proffered is that it was an independent act that in  
13 and of itself created a constitutional violation,  
14 independent and actually caused the prosecution. Then  
15 indeed --

16 JUSTICE KAGAN: But, Mr. Jones, do you --

17 JUSTICE KENNEDY: Well, do you agree that we  
18 should vacate and remand according to the suggestion of  
19 the Solicitor General?

20 MR. JONES: No, Your Honor.

21 JUSTICE KENNEDY: And why is that?

22 MR. JONES: Well --

23 JUSTICE KENNEDY: Is it just because of your  
24 view of the evidence, that there is no evidence to  
25 justify the remand?

1                   MR. JONES: Well, that's certainly one of  
2 the issues. But nothing like this -- what the Solicitor  
3 General is recommending, none of those issues were  
4 raised below, none of those issues were raised in the  
5 Court of Appeals in the Eleventh Circuit, and --

6                   JUSTICE KENNEDY: Are you saying that this  
7 was waived and is just not in the case? Because usually  
8 if the issue wasn't discussed that's the reason we  
9 remand.

10                  MR. JONES: That's correct, it was waived  
11 and it's -- and it's not before the Court and that's not  
12 why cert was granted.

13                  JUSTICE SCALIA: I don't understand how it  
14 was waived. I don't understand that. How was it  
15 waived?

16                  MR. JONES: It was never presented by any  
17 side at any -- to any place in the court below.

18                  JUSTICE KENNEDY: Well, but if -- if there  
19 is -- if there is a theory of liability and we find that  
20 there is -- that that theory is baseless, we don't  
21 generally dismiss the complaint if there are other  
22 allegations in the complaint that could support  
23 liability on another theory.

24                  MR. JONES: Well, certainly, I mean, this  
25 case has to be -- it's going back to the district court

1     anyway, as Your Honor is well aware. And perhaps it can  
2     be raised again at that time with an amendment. But at  
3     the present time it's not in the case.

4                 JUSTICE KAGAN: So, Mr. Jones, could I  
5     understand your responses to these questions, because  
6     you said to Justice Scalia the fact that there's been  
7     testimony at the grand jury does not, if you will,  
8     immunize the person from suit based on other acts. Can  
9     you go further? In a suit based on other acts, could  
10    the grand jury testimony come in as evidence?

11                MR. JONES: If you look at common law,  
12    that's exactly what happened. At common law, and as  
13    Justice Scalia mentioned in his concurrence in Kalina,  
14    what you had is two separate acts when you had a  
15    malicious prosecution at common law. The first act was  
16    actually complaining and making a complaint to, to get a  
17    warrant, in other words swearing at that point in time.  
18    But there again, the person that complained actually  
19    didn't have to be a witness.

20                But when he was a witness or when he or she  
21    became a witness at court, that testimony could then be  
22    used to show malice for the prosecution or for actually  
23    bringing the case.

24                JUSTICE KAGAN: So all you are saying is  
25    that there is absolute immunity for a suit based

1 exclusively on grand jury testimony, and if the suit is  
2 based on something else the grand jury testimony can  
3 come in.

4 MR. JONES: That is correct, if indeed it's  
5 an independent cause of action outside of the court,  
6 yes.

7 JUSTICE SOTOMAYOR: I don't know what an  
8 independent cause of action could be, because it is the  
9 grand jury proceeding that initiates the action. So,  
10 why would the common law permit it unless it recognized  
11 that a complaining witness has to do something to get  
12 the grand jury up and running, and go in and testify to  
13 something false to be liable for malicious prosecution.  
14 But the point I'm making is, I don't see how your  
15 position differs from the government's at all, and I'm  
16 not sure what -- how you could have independent guilt  
17 proven that requires anything more than proof, than the  
18 proof they proffered below, which was that this police  
19 officer issued subpoenas and took other steps to start  
20 the grand jury's process. And then you use their  
21 testimony at the grand jury to figure out whether it was  
22 fault or not.

23 MR. JONES: First of all, to respond, one,  
24 our position with respect to the Solicitor General on  
25 that issue, I don't see it as any different. What I was



1 suggesting, what I understood Justice Scalia to say, is  
2 when you have something independent that forms a cause  
3 of action, for example, if you take and plant evidence  
4 in of a crime, for example cocaine or something of that  
5 nature, that is a separate and distinct cause of action  
6 and that would cause -- that action by an investigator  
7 might very well cause the prosecution or the district  
8 attorney to act when indeed you would have -- they would  
9 find something --

10 JUSTICE BREYER: Is it different from -- I  
11 mean, I find the Solicitor General -- it's my fault, I'm  
12 sure -- I don't understand the position they're taking.  
13 I mean, I think in every case there is some evidence  
14 about what goes on outside the courtroom or the grand  
15 jury room, and then there is some evidence about what  
16 went on inside. And I don't know when you're supposed  
17 to introduce what.

18 So I'm guessing that, whatever the rule is  
19 about when you can use what parts of what, that if you  
20 win the rule about when you should use or when you still  
21 can use the testimony that's given in the grand jury  
22 room is the same as the rule that says when you can use  
23 the testimony of a witness at trial.

24 See, I would have thought that immunity  
25 means you can't use that testimony, but I'm told I'm

1 wrong about that. You sometimes can use it. So then I  
2 don't know when you can use it and when you can't.  
3 Maybe you know. You've studied this case. I admit I  
4 haven't studied it as thoroughly as I hope you have.

5 MR. JONES: I hope I have as well.

6 At least as I understand with respect to --  
7 first of all, if you look at Briscoe, everything that's  
8 in Briscoe, as you know, is absolutely immune from civil  
9 damage litigation.

10 JUSTICE BREYER: When you say absolutely  
11 immune, I'm thinking of a typical case as follows:  
12 Smith says to his friend: I hate that rat Jones. I am  
13 going to go and lie and say he stole my horse.

14 Next step, he goes to the grand jury or  
15 someone and says: Jones stole my horse.

16 Third step, he's in the grand jury room  
17 saying: Jones stole my horse.

18 Fourth, he's at trial, okay?

19 So what comes in and what doesn't? And can  
20 you bring a case in the first place? I'm at sea.  
21 Whatever you can help me with, I'd be happy.

22 MR. JONES: First of all -- and it might be  
23 a difficult time. But the -- when you have a grand  
24 jury, you have something different from just bringing a  
25 cause of action. What you have in a grand jury is you

1 have evidence presented to the prosecutor, typically a  
2 district attorney, and then the district attorney makes  
3 an independent evaluation as to what to bring to the  
4 grand jury and who to indict or whether to indict  
5 anybody whatsoever.

6 That testimony in that grand jury -- if you  
7 bring a cause of action, for example if a cause of  
8 action is brought for malicious prosecution, which  
9 they're trying to do here, what this Court has said in  
10 the Van Dekamp case is that the only time that you can  
11 use that testimony is if there is something else outside  
12 of the grand jury --

13 JUSTICE BREYER: But there's always  
14 something else. He didn't think of this thing for the  
15 first time in the grand jury room. The defendant  
16 thought of this thing outside the grand jury room before  
17 he even got to the grand jury, and he probably told  
18 somebody about it, or he could have, or at least there's  
19 the evidence that he walked to the grand jury room,  
20 okay? So there is always something outside the grand  
21 jury.

22 MR. JONES: Sure, but the case law says that  
23 if the prosecutor would not have taken the case, or  
24 would not have done the case but for the conduct for the  
25 individual, then indeed you cannot bring the cause of

1 action.

2 JUSTICE ALITO: I have the same -- I have  
3 the same concern as Justice Breyer. Let me try to ask  
4 the question in a different way.

5 Can you give me an example of a case in  
6 which someone would qualify as a complaining witness  
7 under Mr. Pincus's definition and yet would not have  
8 done something outside of the grand jury that would be  
9 sufficient to make out a claim of malicious prosecution?  
10 If that situation doesn't exist, then I don't see any  
11 difference between your position and Mr. Pincus's  
12 position.

13 MR. JONES: It does exist, because typically  
14 when you have an investigation in any type of district  
15 attorney's office, what you have is investigators going  
16 out and investigating a case, bringing the material to  
17 the district attorney, then the district attorney looks  
18 at the material, and then the district attorney is the  
19 one that makes an independent decision.

20 JUSTICE GINSBURG: Well, let's go back one  
21 stage. Let's go back to an arrest warrant. The  
22 witness -- and the affidavit in support of the warrant  
23 is filled with lies. The affidavit is presented to a  
24 judge, and I would think that's better than a  
25 prosecutor. And yet there is no absolute immunity for

1 someone who lies in order to get a warrant, even though  
2 the judge makes the judgment whether the warrant should  
3 issue.

4 MR. JONES: The distinction in Malley is --  
5 is this: First of all, the -- in Malley and when you go  
6 apply for a warrant, the -- at that point in time the  
7 investigator is, he is determining -- he or she is  
8 determining the time, place, and manner in which to go  
9 to the judge and also possibly he can, he or she can  
10 select the judge that the person wants to go for. And  
11 then what has happened is that person who presents that  
12 evidence is presenting the evidence that he or she has  
13 gathered and is going to present it in a light most  
14 favorable to the investigation. That person won't  
15 necessarily present the bad part. They might present  
16 just only the, exclusively the good part. And also,  
17 that person isn't under the subpoena power.

18 JUSTICE GINSBURG: Suppose -- suppose we  
19 had, instead of a grand jury proceeding and an  
20 indictment, an accusation to begin the prosecution and a  
21 supporting affidavit in connection with the accusation.  
22 Would there be -- would there be absolute immunity then  
23 for the affidavit that supports the accusation which  
24 will begin the prosecution?

25 MR. JONES: If I understand your question,

1 and I'm not sure I heard it exactly, are you saying if  
2 there's an affidavit that went before the grand jury?

3 JUSTICE GINSBURG: No. We take the grand  
4 jury out of it. We are going to begin the case, the  
5 prosecution, by an information. Or I think the Georgia  
6 law refers to something called an accusation. If -- if  
7 we are not before a grand jury, and the prosecution is  
8 instituted by an information, and there is an affidavit  
9 supporting that information, is there absolute immunity  
10 for the false affidavit in support of the information?

11 MR. JONES: Once again, that's a scenario  
12 essentially in Malley and Kalina, where you had those  
13 individuals coming before. They were not subpoenaed.  
14 Those individuals -- whether it's affidavit or  
15 testimony, I think either one is testimony.

16 JUSTICE GINSBURG: But you -- you cited a  
17 provision of the Georgia Code that seems to equate  
18 what's called an accusation with an indictment. It's on  
19 the bottom of page 22: "All legal proceedings by which  
20 a person's liability for a crime is determined,  
21 commencing with the return of the indictment or the  
22 filing of the accusation."

23 So if the Georgia Code equates those two,  
24 the return of the indictment or the filing of the  
25 accusation, why shouldn't the immunity rule be the same

1 for the two? And you told me that Malley would cover  
2 the filing of the accusation. So why shouldn't it be  
3 the same for the return of the indictment?

4 MR. JONES: And -- and I'm not positive I  
5 understand the question, but as I understand it what you  
6 have in a Malley situation is again you have somebody  
7 that is merely coming before the judge in the hope of  
8 getting a warrant to issue. That person doesn't --  
9 isn't under the constraint of a prosecutor, an  
10 independent prosecutor in the meantime -- actually, the  
11 person asking the questions, asking -- and actually  
12 subpoenaing a witness, like a grand jury. That person  
13 is actually -- and what the Court has said is  
14 potentially wasting judicial resources by bringing a  
15 not-so-good case, just like in Malley, to the court.

16 And so to protect the court and to protect  
17 the judicial process, the Court has said that person  
18 only has qualified immunity so as to make him think and  
19 make the process think before it happens, before they go  
20 to the judge.

21 But in the grand jury scenario you have an  
22 independent individual, in this case the prosecutor,  
23 receiving the evidence and the prosecutor deciding what  
24 cases to bring.

25 JUSTICE SOTOMAYOR: So explain to me

1     again -- over here, Mr. Jones.

2                   Explain to me again why the act of sitting  
3     down with the prosecutor in his office and telling him a  
4     falsehood that leads the prosecutor to convene the grand  
5     jury and call you as a witness, why that act of meeting  
6     with the prosecutor and stating the false statement is  
7     not actionable independently?

8                   Or is it your position that that would be?

9                   MR. JONES:  It is the position that it can  
10    be, and -- and I hate to say -- equivocate there.  But I  
11    will state this:  if indeed that district attorney or  
12    the prosecutor in a case would not have proceeded but  
13    for that testimony or that statements before him, in  
14    other words, he would not have done anything there,  
15    like, as I stated earlier, like the planting of the  
16    cocaine or the finding of the cocaine --

17                  JUSTICE SOTOMAYOR:  No, no, no, no.  He sat  
18    down, told the prosecutor exactly what he was later  
19    going to say in the grand jury.  I rarely called a  
20    witness to a grand jury when I was a prosecutor who I  
21    hadn't spoken to before.  Occasionally I had to because  
22    of circumstances, but the vast majority you sit down and  
23    talk to and find out what their story is.  Identical  
24    story before and after during the grand jury.  Is the  
25    story before an independent act sufficient to bring a



1     malicious prosecution claim?

2                   MR. JONES:   Under that scenario, no.

3     Because the only way that that act can be proven, the

4     only way that the malicious prosecution claim can be

5     proven, would be to get the grand jury testimony

6     before -- to actually utilize that grand jury testimony,

7     and that testimony is absolutely protected under

8     Briscoe.

9                   JUSTICE SCALIA:   I don't understand.

10                  JUSTICE SOTOMAYOR:   You have a time sheet

11     that shows that the prosecutor met with --

12                  JUSTICE SCALIA:   Yes.

13                  JUSTICE SOTOMAYOR:   -- the investigator?

14                  MR. JONES:   I'm sorry?

15                  JUSTICE SOTOMAYOR:   You have a time sheet.

16     You mean, you need a witness to say they met together?

17     You need someone to say that they talked before the

18     grand jury?   Assuming you have that much evidence, you

19     think that's enough?

20                  MR. JONES:   I mean, do you need a witness to

21     come and testify as to whether they had a communication?

22                  JUSTICE SOTOMAYOR:   Yes, exactly.   Is that

23     what you are requiring?

24                  MR. JONES:   It -- it would appear that that

25     would certainly be an element that you would have to

1 establish. Now, whether you would need a witness or you  
2 can get one of those two to testify is another issue.

3 JUSTICE GINSBURG: Do you regard the grand  
4 jury as a judicial proceeding?

5 MR. JONES: Yes, I do. And this Court has  
6 so stated, not only in -- well, the Court has stated  
7 first of all in Burns v. Reed; it talks about how you  
8 have prosecutorial immunity. And in Malley, it also  
9 states it's the first stage of a criminal proceeding.

10 JUSTICE GINSBURG: But there's no judge.  
11 And it seems to me odd to say -- there is no presiding  
12 judge, there is no cross-examination. And the  
13 indictment has the same function as an information. So  
14 why should it rank as a judicial proceeding?

15 MR. JONES: Well, it has many more of the  
16 trappings of a trial than, say, coming before a judge  
17 like in the Malley scenario. First of all, you're  
18 subject to compulsory process. The person is placed  
19 under oath. The person may indeed not even want to come  
20 and testify. I think that was earlier mentioned by  
21 Justice Scalia. The person might not even want to be  
22 there, and yet he's subpoenaed and he's forced to be  
23 there.

24 The -- also in that situation, the district  
25 attorney, he or she, is the one that's controlling the

1 evidence, the one who's controlling what is before the  
2 court, and that person is also determining which person  
3 is going to be indicted and the evidence to be  
4 presented.

5 So the distinction between the two is as I  
6 see it significant. And one, the grand jury is much  
7 more akin to a judicial proceeding and a trial than the  
8 scenario you have in Malley.

9 JUSTICE BREYER: Is the prosecutor immune --  
10 I know the prosecutor is not immune or the complaining  
11 witness is not when they get an arrest warrant. Is the  
12 prosecutor immune when he is taking the step of getting  
13 an information or indictment?

14 MR. JONES: Yes.

15 JUSTICE BREYER: He is immune?

16 MR. JONES: Yes.

17 JUSTICE BREYER: All right. So this is  
18 equivalent to doing that. That's a prosecutorial  
19 function. The prosecution would be immune.

20 MR. JONES: That is correct.

21 JUSTICE BREYER: Of course, this isn't a  
22 prosecutor; this is a subordinate. The person here is  
23 the defend --

24 MR. JONES: No, the person here is the  
25 investigator who is employed by the prosecutor. And I

1 think, as Justice Ginsburg pointed out, the prosecutor  
2 himself in this situation directed the investigator to  
3 appear before the grand jury, and directed him as to  
4 what to testify to at the grand jury. So as Your Honor  
5 pointed out, the -- who is absolutely immune, in the  
6 grand jury setting the prosecutor is immune, the grand  
7 jurors are immune. In trial, the prosecutor is also  
8 immune, any of the witnesses testifying is immune. It  
9 makes logical sense that anybody that comes before the  
10 grand jury is likewise immune.

11 JUSTICE BREYER: Is there any subordinate  
12 government official involved when a prosecutor gets an  
13 information, files an information or -- the way you get  
14 somebody indicted is you have an indictment, which is  
15 the grand jury, I guess.

16 MR. JONES: Right.

17 JUSTICE BREYER: Or an information.

18 MR. JONES: Right.

19 JUSTICE BREYER: All right. When you get  
20 the information, is it just somebody from the district  
21 attorney's office or the prosecutor's office, or is  
22 there somebody else there? Is there a policeman there  
23 that gives any --

24 MR. JONES: There can be.

25 JUSTICE BREYER: There can be, okay. If

1     there is, has he ever been held immune or not? The  
2     prosecutor is immune. Now he's there with an assistant,  
3     the policeman to back him up. Is there any law on that,  
4     whether the policeman is immune?

5                 MR. JONES: Just if he's asking for an  
6     arrest warrant; is that what --

7                 JUSTICE BREYER: No, he's not immune. We  
8     know he's not that. It's just he files the information.

9                 MR. JONES: He files the information and  
10    it's not in a grand jury setting.

11                JUSTICE BREYER: No.

12                MR. JONES: Then indeed, I would suggest  
13    it's very similar to the Malley scenario, where he would  
14    have qualified immunity.

15                JUSTICE GINSBURG: And that would go for the  
16    prosecutor, too, right?

17                MR. JONES: No.

18                JUSTICE GINSBURG: For the information? If  
19    you -- if you granted it was Malley, the -- the  
20    prosecutor who lies to the magistrate is not going to  
21    have absolute immunity, as the arrest warrant states.  
22    Is the prosecutor absolutely immune for making out an  
23    information that is packed with lies?

24                MR. JONES: Yes. Because that is -- that is  
25    what this Court has decided is intimately associated

1 with the judicial phase of the criminal process. And  
2 any of the conduct that is intimately associated under  
3 Imbler, under Kalina, under various things,  
4 Burns v. Reed are intimately -- anything that is  
5 intimately associated is absolutely immune.

6 JUSTICE GINSBURG: Why isn't an arrest  
7 warrant intimately associated?

8 MR. JONES: Well, an arrest warrant in the  
9 -- like in the Kalina and Malley situation, you didn't  
10 have a prosecutor going before them. That was an  
11 independent action by an investigator who went before a  
12 judge to seek a warrant and present any evidence that  
13 that person had.

14 JUSTICE ALITO: Paragraph 29 of the  
15 complaint alleges Mr. Paulk and Mr. Hodges, acting under  
16 color of law, in retaliation and wrongfully influenced  
17 and instigated the prosecutorial decision to bring  
18 charges against Mr. Rehberg.

19 Why isn't that sufficient to support a claim  
20 of so-called malicious prosecution without regard to the  
21 evidentiary -- or without regard to the grand jury  
22 testimony?

23 MR. JONES: Because -- just because they  
24 allegedly conspired together to do this doesn't mean the  
25 act was completed until after, in this case, Mr. Hodges

1 and it was actually Kelly Burke, actually performed what  
2 they did. Now -- and it -- and if the prosecutor knows  
3 about it at that point, and they allegedly conspire, now  
4 who is taking the act? It really is not any more Mr.  
5 Paulk; it is the district attorney who is acting at that  
6 point, and it is the district attorney that is now  
7 proceeding in the grand jury. And as -- as I pointed  
8 out earlier, if anything, that's intimately associated  
9 with the judicial phase, and he's absolutely immune for  
10 his conduct. But even, just because the district  
11 attorney knows about it and so does the investigator  
12 know about it, it is the conduct and the independent act  
13 now of the prosecutor to get the indictment.

14 JUSTICE KAGAN: Mr. Jones, I feel as though  
15 now we are just arguing about facts. It seems to me  
16 that you have accepted a good deal of Mr. Pincus's case.  
17 You've said that you can bring an action against  
18 somebody based on acts outside of court, that the grand  
19 jury testimony can come in as evidence in that action,  
20 and all you're saying is that there's -- there's no way  
21 to bring this action in this case because your client  
22 didn't in fact do anything.

23 MR. JONES: No. And perhaps that's not my  
24 position. First of all, I'm not saying that they're --  
25 what I'm saying with respect to bringing a malicious

1 prosecution claim is that, I think Justice Scalia asked  
2 me if there is a completely independent act, but if --  
3 in the scenario that you paint, just the fact that  
4 they've talked outside the grand jury, that does not  
5 authorize an independent cause of action for a malicious  
6 prosecution claim.

7           What you have to have is an independent act,  
8 just like what you had at common law where you had two  
9 distinct acts: one, where you actually filed the  
10 complaint; now you become the complainant or as the  
11 common law said you became the complaining witness even  
12 if you didn't have to be a witness. But then if you  
13 were a witness, indeed, that testimony that you gave in  
14 the -- in the grand jury or in the trial could be used  
15 as to -- to prove your malicious intent in bringing the  
16 charge initially.

17           And that -- that doesn't equate to what we  
18 have here in this -- in this scenario. What we have  
19 here is there may have been a discussion outside of the  
20 court or outside of the grand jury, but that discussion  
21 now ended and now you have an independent act by the  
22 prosecutor to bring the cause of action. So it's a  
23 completely distinct, as I see it, completely distinct  
24 scenarios.

25           If there are no further questions, thank you



1 very much.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Pincus, you have 4 minutes.

4 REBUTTAL ARGUMENT OF ANDREW J. PINCUS

5 ON BEHALF OF THE PETITIONER

6 MR. PINCUS: Thank you, Mr. Chief Justice.

7 A couple of points. First of all, the --  
8 the question about whether there -- it's an appropriate  
9 rule that a finding of complaining witness can be based  
10 on evidence outside of the grand jury, but it can't be  
11 based on grand jury testimony, that certainly wasn't the  
12 common law rule. And I note Justice Sotomayor asked  
13 whether there were any common law cases that relied  
14 solely on grand jury testimony. And although the cases  
15 are hard to parse, I would point the Court to the  
16 Anderson and the Moulton cases that we cite on page 3 of  
17 our reply brief. In those cases, in the Anderson case  
18 the Court is talking about the charge to the jury, and  
19 what it says the evidence was is the fact that the  
20 defendant was listed as the complainant on the  
21 indictment and that he testified before the grand jury.  
22 And then in the Moulton case the allegations of the  
23 complaint are set forth in the reporting of the case,  
24 and the only allegations are -- relate to the testimony  
25 before the grand jury.

1           So I think it's very hard to find any basis  
2     in the common law which as the Court said -- has said is  
3     the controlling principle here for ruling the grand jury  
4     testimony either entirely out of bounds as a basis for  
5     liability, or for saying it's only in bounds if there is  
6     some other extrinsic evidence. There is just no support  
7     for that in the common law, and I think it doesn't  
8     really make sense -- if this case had proceeded by  
9     information, and Mr. Paulk's grand jury testimony had  
10    simply been placed in an affidavit and submitted in  
11    order to obtain the arrest warrant, Malley and Kalina  
12    would control and it would be clear that there would be  
13    liability --

14           JUSTICE KAGAN: Suppose this a jurisdiction  
15    that didn't have grand juries, but returned felony  
16    indictments by means of the preliminary hearing, would a  
17    witness at a preliminary hearing have absolute immunity?  
18    There is a judge presiding there.

19           MR. PINCUS: A -- a complaining witness, I  
20    don't think -- if that is the proceeding that sets the  
21    prospect, determines whether or not there is going to be  
22    a prosecution, I think an ordinary witness would be  
23    absolutely immune but a complaining witness would not  
24    be.

25           JUSTICE BREYER: Are there States that have

1 -- or are there any other jurisdictions where they don't  
2 give immunity to grand jury testimony for complaining  
3 witnesses or others?

4 MR. PINCUS: Yes, there are. There are,  
5 there are both at the common law and today, Your Honor;  
6 there are --

7 JUSTICE BREYER: Today are there a lot?

8 MR. PINCUS: There are -- I don't know the  
9 number.

10 JUSTICE BREYER: I mean, is there any way to  
11 find out what's happened? Have they been -- have the  
12 grand juries been undermined? Have they not been  
13 undermined? I mean, what has actually happened in those  
14 cases?

15 MR. PINCUS: Well --

16 JUSTICE BREYER: Can you give me an example  
17 of one or two States that allow these actions?

18 MR. PINCUS: Well, I can -- I can't give you  
19 an example of States. I can give you the example of  
20 seven circuits that -- that have adopted the rule that  
21 we contend for. But I don't think --

22 JUSTICE BREYER: For how long have they had  
23 that?

24 MR. PINCUS: Excuse me?

25 JUSTICE BREYER: For how long?

1                   MR. PINCUS: For -- some of them since  
2 Malley, certainly since Kalina, about 10 years.

3                   JUSTICE BREYER: And -- and have there been  
4 many such grand jury acts?

5                   MR. PINCUS: There have been cases. No one  
6 has said the grand jury process has been upset. Courts  
7 have -- have looked into whether or not there was a  
8 complaining witness. Some courts say in order to get  
9 grand jury testimony you have to -- you have to meet  
10 some kind of a threshold. Often these cases are proven  
11 up by deposing the defendant and asking him what he  
12 testified about before the grand jury without intruding  
13 on the grand jury at all. But I think those seven  
14 circuits, there has been no indication of some kind of  
15 disruption of the process.

16                  JUSTICE ALITO: Are those -- are those cases  
17 involving grand jury proceedings like the one here which  
18 does look somewhat like the complaint situation? Or are  
19 they more traditional grand jury settings?

20                  MR. PINCUS: I don't -- I don't want to -- I  
21 don't know, Your Honor. We'd be happy to file something  
22 further, if the Court like.

23                  JUSTICE KAGAN: To me, Mr. Pincus, the  
24 oddest thing about your case is the notion of being able  
25 to sue the investigator when you can't sue the

1 prosecutor for whom he works. So that even if there  
2 is -- are some set of people that you -- that you could  
3 sue for actions in the grand jury context, the notion  
4 that you can sue an employee of a prosecutor when you  
5 can't sue the prosecutor seems an odd rule.

6 MR. PINCUS: Well, Your Honor, I think the  
7 question here would be effectual one, as you pointed  
8 out. Is Mr. Paulk the person who set this in motion?  
9 If the testimony is -- may I finish?

10 If the testimony is that Mr. Paulk was just  
11 told what to do by the prosecutor and didn't have any  
12 additional anything, then perhaps he won't be found  
13 liable anyway.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
15 The case is submitted.

16 (Whereupon, at 11:01 a.m., the case in the  
17 above-entitled matter was submitted.)

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